



United States
Department of
Agriculture

Food and
Nutrition
Service

Mountain
Plains
Region

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MAY 06 2004

Reply to
Attn. Of: SP-04-09

Subject: Applicability of Federal Requirements to State Agency (SA) Procurement
Using State Administrative Expense (SAE) Funds.

To: STATE AGENCY DIRECTORS:
(Special Nutrition Programs)

Colorado ED, Colorado DPHE,
Colorado HS, Iowa, Kansas,
Missouri ED, Missouri DPHE,
Montana OPI, Montana DPHHS,
Nebraska ED, Nebraska HHS,
North Dakota, South Dakota, Utah,
and Wyoming

As you are aware, in August 2000, the procurement requirements for the Child Nutrition Programs were moved from Department regulation 7 CFR Part 3015 to 7 CFR Parts 3016 and 3019. We have previously issued a memorandum with a set of questions and answers on the applicability of these Federal requirements to procurements made by school food authorities, SP 03-17, dated May 28, 2003. Attached to this memorandum are answers to a number of questions FNS has received concerning how these requirements affect SA procurement procedures when those procurements involve the use of SAE funds.

If you have questions, please contact our office at (303)-844-0354.

Darlene Sanchez

DARLENE SANCHEZ
Regional Director
Special Nutrition Programs

Attachment

Applicability of Federal Requirements to State Administrative Expense (SAE) Fund Expenditures May, 2004

Question 1: What regulations apply to SAE funded procurements?

Answer: A State agency (SA) expending SAE funds is subject to the procurement requirements found at 7 CFR Part 235.9. Part 235.9 states procurements must comply with the Part 3015 requirements. As you know, Part 3016 replaced Part 3015 in August 2000, so SAs are required to comply with Part 3016. The reference to Part 3015 in Part 235.9 does remain appropriate, because Part 3015 was also amended in August 2000 to reference Part 3016 for procurement requirements. The general procurement requirements are found at §3016.36. Since SAE is classified as an entitlement program, additional procurement rules are found at §3016.60.

Question 2: How do the provisions of §3016.60 apply to SAE funded procurements?

Answer: Part 3016.60(a) gives the SA two options when conducting a procurement that will be funded with SAE. The SA may follow §3016.36(a), i.e., its own State laws, policies and procedures, or the SA may follow the procurement standards found at §3016.36(b-i).

Regardless of whether the SA follows §3016.36(a) or §3016.36(b-i), the SA must comply with §3016.60(b and c). Part 3016.60(b) prohibits the award of a contract when the potential contractor engages in certain activities that could undermine free and open competition. Part §3016.60(c) prohibits the use of statutorily or administratively imposed in-State or local geographic preferences in the award of most contracts.

Question 3: If State rules permit the SA to enter into a cost plus percentage of cost contract, may the SA pay for the contract with SAE funds?

Answer: Yes, as long as cost plus percentage of cost contracts are permitted under State rules and the SA has chosen to follow its own State rules. Given that cost plus percentage of cost contracts provide no incentive for contractors to control costs, we do not recommend SAs enter into this form of contract pricing. If the SA is intent on entering into this form of contract pricing, we strongly encourage that the SA ensure adequate cost controls exist within the contract.

Question 4: If the State rules permit a SA to enter into a contract with a college or university without any form of competition, can the SA use SAE funds to pay for the contract?

Answer: Yes. Part 3016.36(a) directs a SA, spending Federal funds, to follow the same policies and procedures that it would use for procurements from its non-Federal funds. Since, in this question, the SA is following its own rules, SAE funds could be used to pay for the contract costs.

Questions and Answers on SAE Expenditures Under 3016, May 2004, page 2

Question 5: May a SA seek FNS interpretation and guidance on how to comply with some of its State procurement rules? What assistance may FNS provide?

Answer: It is not appropriate for FNS to interpret and provide guidance on State rules. The SA will be directed to seek interpretation and guidance from its own State officials responsible for procurement. However, the SA must be aware that the provisions of Part 3016.60(b and c) must be followed, regardless of its own State rules.

Question 6: When conducting a management evaluation, how does FNS determine that the SA has complied with its own procurement rules?

Answer: Unless FNS has reason to believe (audit, complaints, etc.) that the SA has not complied with its own procurement rules, FNS will need only to review the SA's compliance with Part 3016.60. If FNS believes, or has information, that the SA did not comply with its own procurement rules, it will work with the appropriate State officials, e.g., State auditors, procurement and legal officials, to identify the scope of the deficiency and the appropriate actions to remedy the deficiency.

Question 7: Does the SA have the same option of following its own State rules when the resulting contract will be paid with CN program (National School Lunch, School Breakfast, Child and Adult Care Food and Summer Food Service Programs) funds?

Answer: Not unless the State's rules are at least equal to the Federal requirements at 3016.36(b-i) or Part 3019.40-48, as applicable. SAs conducting procurements on behalf of CN program participants, e.g., school food authorities, Child and Adult Care Food Program institutions and Summer Food Service Program sponsors, must follow the same rules that the program participant would follow. This is because the rules for expenditure of CN program funds differ from those that apply to SAE expenditures. For public organizations these requirements are found at §3016.36(b-i) and §3016.60(b and c), while the nonprofit requirements are found at §3019.40-.48.